

**IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE**

FEDERAL INSURANCE CO., and EUGENE BAUSELL d/b/a BBC  
CONSTRUCTION COMPANY, Appellee v. PENNSYLVANIA NATIONAL  
MUTUAL CASUALTY, and GEORGE POWELL d/b/a GEORGE POWELL  
CONSTRUCTION COMPANY, Appellant, and TONYA TURNER, ET AL.,  
Appellee

Direct Appeal from the Chancery Court of Davidson County, TN  
No. 98-1512-II, Hon. Carol McCoy, Chancellor

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No. M1999-01917-WC-R3-CV - Mailed - July 17, 2000  
Filed - August 17, 2000

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. In this case, a temporary employer and its insurance company contend the trial court erred in finding a deceased employee to be a loaned servant. The panel has concluded that the judgment of the trial court should be affirmed because the deceased employee was a loaned servant.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Chancery Court Affirmed**

Turnbull, Sp.J., delivered the opinion of the court, in which Drowota, J., and Loser, Sp.J, joined.

Michael K. Atkins, Baker, McReynolds, Byrne, O'Kane, Shea & Townsend, Knoxville, TN, for the appellants, Pennsylvania National Mutual Casualty, et al.

Richard E. Spicer and Michele Howard, Spicer, Flynn, & Rudstrom, PLLC, Nashville, TN, for the appellees, Federal Insurance Company, et al.

**MEMORANDUM OPINION**  
**Background**

The deceased employee, David Turner, was a concrete finisher for BBC Construction Company and had worked for the company for nine years prior to his death. He is survived by a wife

and three children. George Powell Construction Company performs commercial and industrial construction; its insurer is Pennsylvania National Mutual Casualty. BBC Construction does primarily concrete-related construction; it is insured by Federal Insurance Company.

George Powell Construction Company (“GPC”) had contracted to construct a building at the Bonnell Treadguard plant in Smith County, Tennessee. George Powell, the owner of GPC, needed a person to assist his regular employees with concrete finishing work at the job site because the regular concrete finisher on staff had recently resigned and no one else had experience with finishing large slabs. Previously GPC had subcontracted some work on the project to Eugene Bausell, d/b/a BBC Construction (“BBC”), but that work had been completed. In this instance, Powell requested Bausell’s help with the concrete finishing portion of the project. Powell first asked for Eugene Bausell’s brother, Don, who is not a BBC employee. Previously, GPC had contacted BBC to arrange for work to be done by Don Bausell. When work was arranged for him by BBC, Don Bausell was paid separately; he did not represent BBC. When Eugene Bausell notified Powell that Don Bausell was unavailable, Powell asked for anybody that Eugene Bausell could find to help. Bausell told Powell that one of two workers could aid GPC for the day. Since neither had a driver’s license, Bausell told Powell he would need to pick up whichever employee could be spared and take him home afterwards. Powell agreed. Bausell asked Turner if he wanted to do the job for Powell and Turner accepted.

On April 15, 1998, Powell sent an employee of GPC to pick up Turner. GPC needed Turner to lead the crew in finishing large slabs since no one on the crew had experience in such practices. When Turner arrived at the job site, the concrete finishing job was already underway. Turner helped GPC employees finish the already begun portion of concrete work and started on another finishing job. In its operations, GPC utilized a crane to transport large buckets of concrete from the truck to the area where it would be poured and finished. The crane came in contact with electricity, and Turner, who had been on the ground with two other employees maneuvering the buckets, was electrocuted.

Pennsylvania National Mutual Casualty (“Penn”), GPC’s workers’ compensation carrier, refused to acknowledge liability. Federal Insurance Company, BBC’s carrier, paid benefits to Turner’s family pending the determination of which company is to be held liable.

From the evidence, the trial judge found that Turner was a “loaned servant” by law and imposed liability on Pennsylvania National Mutual Casualty and GPC for any worker’s compensation benefits arising from Turner’s death. Federal Insurance and BBC were to be reimbursed for any payment made to or on behalf of the Turners including funeral expenses and medical expenses.

### Analysis

The applicable law defining a “loaned servant” is set forth in *Catlett v. Indemnity Insurance Company*, 813 S.W.2d 411 (Tenn. 1991). In *Catlett*, this Court examined workers’ compensation liability under the “loaned servant” doctrine. The *Catlett* court first observed that

the controlling test for when an employee becomes a loaned servant was set out in *Winchester -v- Seay*, 219 Tenn. 324 409 S.W.2d 378 (Tenn. 1996). In that case, the injured worker was a regular employee of the Grand Hotel in Chattanooga where he performed maintenance duties, and was paid a regular salary. On the day in question, he was requested by the owner of a restaurant ... to adjust an air conditioner at a restaurant located two doors away from the Grand Hotel ...

The employee ... was injured while repairing an air conditioner in the restaurant. This work was done at the request of the restaurant owner and with the permission, or acquiescence, of the regular employer.

Id. At 414. As pointed out by the *Catlett* court, the plaintiff in *Winchester* was a loaned servant because

the injured employee had been working for the restaurant owner doing repair work which was necessary to be done in the restaurant and for it alone. It was further noted that none of the work being performed was done for the regular employer, nor was the injured worker at the direction of the regular employer at the time he was injured ... [A]ccordingly, the owner, the special employer, became solely responsible for the injury sustained while the worker was adjusting the air conditioner.

Id. At 414-15. The *Catlett* court then quoted with approval the rule laid down in *Winchester*:

When a general employer loans an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has the right to control the details of the work.

*Winchester* at 415.

When the test is satisfied, the burden to compensate falls on the employer whose work is being performed.

#### Express or Implied Contract of Hire

The closest issue in this case is whether there was a contract of hire. It is undisputed that there was no express contract because Turner and GPC never communicated directly. Implied

contracts of hire require an express or implied agreement for the alleged employer to pay the alleged employee. *Black v. Dance*, 643 S.W.2d 654, 657 (Tenn. 1982). Penn argues that there was no such agreement between GPC and Turner; therefore, no contract existed. However, Turner had the choice of taking the work for GPC and could have declined. In fact, Mr. Bausell testified he would have been required to telephone Mr. Powell and inform him that he could not be of assistance in locating help for Powell if Turner had declined. By accepting the job, Turner consented to work for GPC. Furthermore, *Catlett* instructs that what is most significant is not who delivers the paycheck but rather the work circumstances under which the paycheck is earned. 813 S.W.2d at 416. In *Elliot v. Elliot Bros.*, 52 S.W.2d 144 (Tenn. 1932), the general employer had no interest in the work performed but paid the employee's wages; this Court held that the general employer was not liable for the employee's injuries while on the job. *Id.* at 145-46. The test for whether or not one is a loaned servant focuses less on who was to pay the employee, but instead focuses more on for whom the work was being done.

#### Whose Work Being Done

The second factor of the test, that the work being done is essentially that of GPC, is undisputed. BBC had no interest in the work being done for or by GPC. The work was being done solely for the benefit of GPC. Previous cases point out that in determining whether one is a loaned servant much emphasis is placed on whose work the employee was engaged in at the time of the accident. *Kempkau v. Cathey*, 277 S.W.2d 392, 394-95 (Tenn 1955); *Potts v. Knox-Tenn Rental, Inc.*, 467 S.W.2d 796, 798 (Tenn. Ct. App. 1970).

#### Control of the Details of the Work

Penn argues that no one at the job site controlled the details of Turner's work especially considering his expertise in concrete finishing. Penn contends that Turner had control of the details since he had control over the instruction that he was providing to GPC employees regarding the concrete finishing work.

Although a special employer must have the right to control the details of the employee's work, he need not exercise that right. *Price v. McNabb & Wadsworth Trucking Co.*, 548 S.W.2d 316, 319 (Tenn Ct. App. 1976) (citing *Wooten Transports, Inc. v. Hunter*, 535 S.W.2d 858 (Tenn. 1976)). Here, Turner received directions as to where to pour the concrete from GPC, and there was also a supervisor present to ensure the work was completed properly. BBC had absolutely no control over the details of Turner's work, but GPC did.

The trial court noted that the particular task an individual employee has been loaned out to perform is irrelevant. What is key is which employer was responsible for attempting to dictate the employee's actions at the time of the accident. In this case, Turner's work was in the hands of GPC, and BBC had no interest or control of Turner's work.

THE RESTATEMENT (SECOND) OF AGENCY § 227(c) (1957) states that in determining liability

“the important question is not whether or not [the employee] remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other.” Here, it is clear that Turner was aiding in finishing concrete for GPC, and GPC was in control of the necessary details of Turner’s work.

The fact that Powell requested Don Bausell, who was not an employee of BBC, to perform the work originally shows that he did not intend to employ BBC. GPC merely wanted to and did borrow an employee (loaned servant). BBC did not have any interest in the work Turner was performing for GPC; thus, he was not representing BBC. As noted by the trial court, BBC would not normally gratuitously lend an employee unless it would not be liable in case of injury.

Based on the foregoing, we conclude that although Mr. Turner was the nominal employee of BBC, he was also the “loaned servant” of George Powell Construction Company.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, Pennsylvania National Mutual Casualty, and George Powell Construction Company.

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**JUDGMENT**

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by appellants, Pennsylvania National Mutual Casualty, and George Powell Construction Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM